UNITED STATES
v.
PHYRNE BROWN

IBLA 89-590 Decided November 2, 1992

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer, directing issuance of an order granting general permission to engage in placer mining on mining claims CAMC 39658, CAMC 39662 through CAMC 39665, CAMC 54233, and CAMC 54234.

Reversed.

1. Act of August 11, 1955--Mining Claims: Powersite Lands--Mining Claims: Special Acts--Mining Claims Rights Restoration Act--Powersite Lands--Withdrawals and Reservations: Powersites

Locators of claims on land opened under 30 U.S.C. § 621(a) (1988) have been required by 30 U.S.C. § 623 (1988) to file copies of their location notices with BLM within one year after Aug. 11, 1955, for all locations previously made, or within 60 days of location for locations thereafter made.

2. Act of August 11, 1955--Mining Claims: Powersite Lands--Mining Claims: Special Acts--Mining Claims Rights Restoration Act--Powersite Lands--Withdrawals and Reservations: Powersites

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. §§ 621-625 (1988), authorizes the location and patent of mining claims on public lands withdrawn for power purposes. However, the Department may hold a public hearing to determine whether placer mining operations would substantially interfere with other uses of the land and may issue an order providing for one of the following three alternatives: (1) a complete prohibition on placer mining; (2) permission to engage in placer mining upon the condition that the locator shall restore the surface of the claim; or (3) a general permission to engage in placer mining.

3. Act of August 11, 1955--Mining Claims: Powersite Lands--Mining Claims: Special Acts--Mining Claims Rights Restoration Act--Powersite Lands--Withdrawals and Reservations: Powersites

Where a copy of the notice of location of a mining claim on land withdrawn for power site purposes was not recorded with BLM within the time prescribed by 30 U.S.C. § 623 (1988), a notice of intent from BLM to conduct a hearing under sec. 621(b) will not be considered untimely if the notice of intent was issued within 60 days after receipt of some affirmative acknowledgement by the owner of the claim that the claim was subject to that provision of the Act.

4. Act of August 11, 1955--Mining Claims: Powersite Lands--Mining Claims: Special Acts--Mining Claims Rights Restoration Act--Powersite Lands--Withdrawals and Reservations: Powersites

To determine whether mining would "substantially interfere" with other uses of powersite lands within the meaning of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1988), the Department is required to engage in a weighing or balancing of the benefits of mining against the injury mining would cause to other uses of the land. Mining may be allowed where the benefits of mining outweigh the benefits from other uses.

5. Act of August 11, 1955--Mining Claims: Powersite Lands--Mining Claims: Special Acts--Mining Claims Rights Restoration Act--Powersite Lands--Withdrawals and Reservations: Powersites

In making a determination whether placer mining operations would substantially interfere with other uses of powersite lands, the party who seeks to restrict or prohibit placer mining bears the initial burden of presenting a prima facie case. The burden then shifts to the mining claimant to overcome the case so proved by a preponderance of the evidence.

APPEARANCES: Burton J. Stanley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for appellant; Ralph J. Campbell, Esq., Mariposa, California, for Phyrne Brown.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Bureau of Land Management (BLM) has appealed from a July 11, 1989, decision of Administrative Law Judge Harvey C. Sweitzer, directing issuance of an order granting general permission to engage in placer mining operations on a group of mining claims pursuant to the Mining Claims

Rights Restoration Act of 1955 (MCRRA), 30 U.S.C. §§ 621-625 (1988). 1/ That statute authorized the location and patenting of mining claims on certain land withdrawn for powersites, but provided that the Secretary may order a hearing to determine whether placer mining operations would substantially interfere with other uses of the land.

BLM contends that uncontradicted evidence shows that detrimental effects of placer mining on recreational use of the river where the claims are located justify an order completely prohibiting such mining on the claims. Counsel for Phyrne Brown, the owner of the claims, asserts that the operator on the claims improved a campground at his own expense and that the MCRRA "is crystal clear that in the event that the Bureau of Land Management fails to object to a location of a mining claim in a withdrawn area within sixty (60) days said claim is valid" (Answer at 2).

[1] The mining claims at issue are situated along the Merced River in Mariposa County, California, on lands withdrawn for a water powersite by Executive Order No. 204 dated September 4, 1911. Locators of claims on land opened under 30 U.S.C. § 621(a) (1988) are required by section 623 to file copies of their location notices with BLM "within one year after August 11, 1955, as to any or all locations heretofore made, or within sixty days of location as to locations hereafter made." No notices of location meeting the requirement of this provision were ever filed by Brown or her predecessors in interest. No copies of location notices of any sort were filed for these claims until October 1979, the deadline for filing copies of location notices for older claims under 43 U.S.C. § 1744 (1988), and these notices bore no notation that they were being filed pursuant to the MCRRA. See 43 CFR 3734.1(c).

1/ The decision under review describes the claims as follows:

Claim Name	BLM Serial No.	Original Location Date
Bulaich	CAMC 39658	February 8, 1934
Five Star	CAMC 39662	June 21, 1968
Suzanne	CAMC 39663	March 12, 1963
Monte Carlo	CAMC 39664	March 11, 1963
Malecou	CAMC 39665	May 12, 1947
Tie In	CAMC 54233	March 13, 1963
Mindoro	CAMC 54234	April 16, 1965

The Administrative Law Judge's decision also explains that, by decision dated Apr. 4, 1986, the Bulaich (CAMC 39658) and Malecou (CAMC 39665) claims were declared null and void ab initio for the stated reason that they were located after the subject lands were withdrawn and before the MCRRA restored any rights to locate mining claims on the withdrawn land. This decision was later vacated to permit respondent to prove holding and working the claims for the requisite period of time subsequent to enactment of the MCRRA in accordance with the provisions of 30 U.S.C. § 38 (1988). A letter to George Hansen (respondent's lessee) dated Feb. 4, 1987 (but obviously written and sent on or about Feb. 4, 1988) indicates the requisite showing was made by evidence submitted Sept. 12, 1986, but does not set forth the effective date of the filing of location (Decision at 4).

[2] Under the statute, only the filing of a notice by the locator meeting the requirements of section 623 initiates the running of the 60-day period Brown contends operated to her benefit in this case. The statute provides that:

> The locator of a placer claim under this chapter, however, shall conduct no mining operations for a period of sixty days after the filing of a notice of location pursuant to section 623 of this title. If the Secretary of the Interior, within sixty days from the filing of the notice of location, notifies the locator by registered mail or certified mail of the Secretary's intention to hold a public hearing to determine whether placer mining operations would substantially interfere with other uses of the land included within the placer claim, mining operations on that claim shall be further suspended until the Secretary has held the hearing and has issued an appropriate order. The order issued by the Secretary of the Interior shall provide for one of the following: (1) a complete prohibition of placer mining; (2) a permission to engage in placer mining upon the condition that the locator shall, following placer operations, restore the surface of the claim to the condition in which it was immediately prior to those operations; or (3) a general permission to engage in placer mining. No order by the Secretary with respect to such operations shall be valid unless a certified copy is filed in the same State or county office in which the locator's notice of location has been filed in compliance with the United States mining laws.

30 U.S.C. § 621(b) (1988). Thus, under the system contemplated by the act, locators on land withdrawn for power development will file a copy of the claim location notice with BLM, wait 60 days, and may then begin operations if no notice of a hearing was sent during the 60-day waiting period. If this provision is strictly construed, the 60-day waiting period operates only to define the time that a claimant is required to refrain from conducting mining operations. If a notice of intention to hold a hearing were sent by BLM to the claimant within the 60-day period, mining operations would be suspended until after a hearing was held and an order issued. If the notice came after the waiting period had run, however, a suspension would not be required. Nothing in the language of this provision prevents BLM from issuing a notice that there will be a MCRRA hearing more than 60 days after a notice of location is filed. The only effect of a tardy notice from BLM is to relieve the claimant of the restriction that operations must be suspended pending hearing. Because the claimant here has not been required to suspend operations since the time the claims were located, no prejudice has resulted to her from the manner in which notice was initiated.

The language of subsection 621(b) was offered by this Department to Congress, which enacted the proposed language verbatim. S. Rep. No. 1150, 84th Cong., 1st Sess. (1955), reprinted in 1955 U.S.C.C.A.N. 3006, 3007, 3008, 3011-12. The legislative history makes clear that the operation of the time limitation provided in subsection (b) depended on the timely

filing of a copy of the notice of location of a claim by the owner. "[I]t is particularly important that the Secretary of the Interior be advised immediately when placer claims are initiated since the most serious conflict between mining activities and other land uses occurs when placer mining and dredging operations are involved." Id. at 3011.

Operation of the 60-day period in subsection (b) also assumed "that, under section 4 [30 U.S.C. § 623 (1988)] of the bill, failure to record location would render the claim invalid." Id. Contrary to this assumption by the drafters of MCRRA, however, a court held that the failure of the original locators to comply with this requirement did not lead to forfeiture of their claims. MacDonald v. Best, 186 F. Supp. 217 (N.D. Calif. 1960). The Department acquiesced in this decision. B. E. Burnaugh, 67 I.D. 366 (1960). Consequently, the filing requirement that would trigger the beginning of the 60-day period was often unmet, and in the absence of an affirmative indication from a mining claimant that his filing is made pursuant to this provision, the 60-day period for the Department to notify the locator of its intention to hold a hearing could never begin.

Although copies of the location notices for the subject claims were filed in 1979 to satisfy the general recordation requirement of 43 U.S.C. § 1744 (1988), they contained no notation that they were also being filed to satisfy the requirement of 30 U.S.C. § 623 (1988). Prior to the enactment of 43 U.S.C. § 1744 (1988), few statutes required Federal recordation of mining claims, and the reason for filing such a notice with BLM would have been readily apparent. But with the enactment of 43 U.S.C. § 1744 (1988), the huge annual volume of filings of notices of location, as well as affidavits of assessment work, obscures the possibility that those location notices are also being filed pursuant to other statutes unless some clear notification appears on the face thereof. To suggest that the filing of unidentified location documents would initiate the 60-day period provided by MCRRA during which BLM is required to give notice of intent to hold a hearing would be absurd.

Furthermore, any copy of a notice of location filed more than 60 days after the date of location cannot, on the face of it, be considered filed "pursuant to section 623 of this title." Thus, it can be reasonably argued that such a notice could not begin the 60-day period during which BLM is to send notice of intent to conduct a hearing, because a late notice can never be said to have been filed "pursuant to section 623." The practical effect of such a holding is that a mining claimant who fails to file timely a copy of his notice of location waives any objection to the tardiness of a notice from BLM of intent to hold a hearing. In light of the fact that the draftsmen of the statutory language predicated the operation of the time periods in subsection (b) on the timely filing of a copy of the notice of location of a claim by the locator, such a holding would not be unreasonable.

[3] In the case of these claims, BLM declared that it was agency policy that it would not process claims under MCRRA until requested to do so by the owner of record. See letter dated Feb. 4, 1987, from Rose M. Fairbanks, BLM, to George E. Hansen, General Partner, Merced Mining Company,

Ltd. 2/ This stated policy is consistent with the foregoing analysis of the statute. Phyrne Brown's request for MCRRA review was received by BLM on February 16, 1988. BLM issued notice of intent to hold a hearing on March 28. We need not select any one of the alternative rationales concerning notice under MCRRA discussed above in order to approve this procedure, since under any of them, we must conclude that BLM's hearing notice was not untimely made.

[4] To determine whether mining would "substantially interfere" with other uses of powersite lands within the meaning of 30 U.S.C. § 621 (1988), the Department is required to engage in a weighing or balancing of the benefits of mining against the injury mining would cause to other uses of the land. U.S. Forest Service v. Milender, 104 IBLA 207, 218, 95 I.D. 155, 161 (1988). Mining may be allowed where the benefits of mining outweigh the benefits to other uses. Id.

[5] In making such a determination, the party who seeks to restrict or prohibit placer mining bears the initial burden of presenting a prima facie case. The burden then shifts to the mining claimant to overcome such a prima facie case by a preponderance of the evidence. Id. at 104 IBLA 234 n.9, 95 I.D. 171 n.9.

The Milender case provides an illustration of how the balancing process works because two claims, the Agate One and the Red Rock, were analyzed. We held mining was prohibited on the Agate One claim but was allowed on the Red Rock claim subject to the condition that the claimant restore the surface of the claim. The Forest Service had asserted that mining operations would substantially interfere with the use of both claims for timber production. The timber on the Agate One had been previously harvested and most of the trees on that claim had not yet reached maturity. We found that the Forest Service had established that there would be a loss caused by mining because of mortality to trees which had not yet reached maturity as well as a loss in the annual growth during the period in which full scale mining would

2/ BLM's current practice is published in BLM Manual 3833.6.61.B:

"1. P.L. 84-359, Powersite Withdrawals. Placer mining claims recorded in powersite withdrawals are subject to a 60-day waiting period whereby mining cannot occur. If BLM determines that placer mining operations on the land may substantially interfere with other uses, a notice of intention to hold a hearing shall be sent to each of the locators by registered or certified mail within 60 days. (See 43 CFR 3736.1(b) and United States Forest Service v. Walter D. Milender, 104 IBLA 207 (1988), 95 I.D. 155 (1988)).

"a. If a placer claim is recorded under FLPMA, and it is not identified by the owner as being located in a powersite withdrawal, the 60-day prohibition against mining shall begin when BLM discovers the placer claim is subject to the Act. A decision is sent notifying the owner that mining cannot occur for a 60-day period and reciting the conditions of the Act."
(Rel. 3-264, Apr. 5, 1991).

occur. The mining claimant had provided no information to support a finding that benefits obtainable from mining would outweigh losses directly attributable to it on that claim. The Red Rock claim, on the other hand, was only partially within the powersite withdrawal, and was of marginal commercial timber value, having been damaged by prior logging operations which caused substantial soil erosion. The existing volume of timber on
the portion of the Red Rock claim was low, but it was mature and its value could be realized upon harvesting. Timber on the claim had been classified into the lowest commercial category, and would not regenerate successfully for silvicultural purposes. Consequently, the Board found that it
was appropriate to allow mining operations subject to reclamation on the
Red Rock claim.

In the instant case, recreation constitutes the primary use of the
land with which mining operations are alleged to interfere. The claims lie along the Merced River just below the town of Briceberg, along a portion of that river that was designated as a potential addition to the National Wild and Scenic River System in 1987, 16 U.S.C. § 1276(a) (1988). The incompatibility of mining with that status is evidenced by the withdrawal of such land from mining for the period during which the river is being studied. 16 U.S.C. § 1278(b) (1988). Although we recognize that these claims were located prior to the withdrawal, conduct of operations on those claims has always been subject to the requirements of 30 U.S.C. § 621 (1988), and it
is therefor proper for us to look to the purposes of the withdrawal and determine whether placer mining operations would substantially interfere with them.

In order to justify the prohibition of mining, the United States
must "sufficiently establish such a substantial use of the land for uses other than mining which warrants a prohibition on mining." United States v. Milender, 104 IBLA at 215, 95 I.D. at 160, quoting United States v. Mineral Economics Corp., 34 IBLA 258, 262 (1978). At the MCRRA hearing,
James Eicher, an outdoor recreation planner with BLM's Folsom Resource
Area testified that the competing recreational activity consists of white water rafting both by commercial outfitters and others, and camping, fishing, picnicking, hiking, and swimming (Tr. 66-67). He testified that eight outfitters are allowed to be on the river daily during the rafting season and are able to carry 200 commercial clients on any given day (Tr. 83). Although an operator may, at the end of a 1-day trip, decide to take out
his boats at Briceberg, Eicher testified that 90 percent of the outfitters went past Briceberg and took their rafts out of the river 2 miles downstream of the town at the McCabe Flat Campground which is situated on two of the Brown mining claims (Tr. 84). BLM established this campground, providing improvements including rest rooms and lavatories at the site. For users who camp overnight elsewhere, the McCabe Flat Campground provides a place where they pick up their overnight supplies. Without the McCabe Flat Campground, outfitters would have to bring an additional boat to carry the gear, with the attendant risk of loss when they go through the rapids.

With respect to the individual claims, Eicher stated that the
stretch along the Five Star claim is a very popular day-use area (Tr. 88). The Tie-in claim has Cable Rock which is a popular day-use swimming area.

The Malecou claim is where Split Rock rapid is found, a class 4 rapid where cables and equipment could create a potentially dangerous situation (Tr. 89). The Suzanne claim lies at the entrance to the McCabe Flat area. Another important rapid is at the Bulaich claim. Eicher stated that the area is a potentially dangerous rapid at lower water levels because of previous dredging activities that created a hydraulic or hole which at times has capsized rafters. The Monte Carlo claim also encompasses part of the McCabe Flat Campground and its campsites, including part of a beach area used by day-users and as a launching point by private and commercial boaters (Tr. 89). Commercial outfitters camp near or on claim No. 7 (Tr. 89(A)).

Deane Swickard, BLM's Area Manager, testified about the factors he considered when applying the balancing test required in Milender. He estimated recreational dredging of gold along the Merced River at about 1,500 visitor-days per year (Tr. 110). He testified that 10,000 visitor-use-days of rafting and camping, hiking, biking, fishing, and other uses occur along the narrow river corridor (Tr. 110). Sixty-five hundred of those use-days involve commercial white water rafting. Swickard estimated that recreational traffic along the Merced River corridor, most of which passes through from Briceberg to the McCabe Flat Campground across the claims here under review, produces $1,250,000 to $1,500,000 worth of income each year (Tr. 112). We find this testimony sufficient to establish that recreation constitutes a substantial use of the land.

Tim Carrol, a BLM geologist, testified that placer mining operations would substantially interfere with recreational use by allowing destruction of the campground, and by the placement of cables and dams across the river, activities that BLM would be unable to totally prevent under regulations provided at 43 CFR 3809 (Tr. 53-58). Area Manager Swickard estimated that there was between $3 to $5 million worth of gold that could be recovered from the claims (Tr. 110). Nonetheless, he finally determined that recreation would have a less adverse impact on the environment and would be pleasing to a greater number of people than mining (Tr. 113). Commercial outfitters offering river raft trips on the Merced also testified and provided specific examples of the hazards posed by mining to recreation. One of them, Larry Ogden, General Manager of White Water Voyagers, testified that he runs approximately 1,000 user-days each year on the Merced River and that if he is unable to use the McCabe Flat Campground, he anticipates his user-days would be reduced by three-fourths (Tr. 124-25).

The claimant offered no testimony to rebut or contradict the evidence put on by BLM. BLM's evidence was sufficient to establish a prima facie case for a prohibition of mining on the stream, and there is nothing whatever in the record before us to support a finding that the claimant was able to overcome the evidence offered by BLM. While Judge Sweitzer found that BLM has no management authority to prevent the hazards posed by mining dredges, drag lines, and other mechanical equipment in the river, he did not consider this to be a substantial interference with other uses so as to warrant an order to prohibit placer mining of the area (Decision at 9). To justify this conclusion, he found that mining had already been conducted on the claims in coexistence with other uses. This finding, however, is

not supported in the record and is contrary to Swickard's uncontradicted testimony that no mining activity of any consequence had occurred during
the 5 years prior to hearing (Tr. 107). It necessarily follows that any increase in that level of mining activity would increase the level of hazards beyond those already identified in the area.

While Judge Sweitzer found that the loss of the McCabe Flat Campground to recreational use would only be temporary, BLM nonetheless has no authority to limit operations on the claims to the period of "perhaps 5 years"
as he found in his decision. Id. at 10 n.4. Nor is there any evidence to indicate that mining would be limited to such a timeframe. Indeed, under the order authorized by the decision here under review, the mining would be "general" and of unlimited duration (Decision at 10-11).

Finally, Judge Sweitzer failed to consider the designation of this river by Congress as a potential addition to the wild and scenic river system. Implicit in such a designation is the determination by Congress that recreational uses are substantial, and implicit in the withdrawal of those lands from mineral location is a determination that mining activity would substantially interfere with those uses. Although BLM is obliged to recognize valid existing rights to mine, the mining claimant failed to give notice that she wished to obtain a determination of her rights under 30 U.S.C. § 623 (1988) at a time when BLM could have granted a general permission to mine without substantially interfering with other uses. By waiting until recreational use had developed into a substantial competing use for these lands, she accepted the consequences of her own delay, and cannot now be heard to complain that she might have obtained a better result at an earlier time.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and BLM is directed to issue an order providing for the complete prohibition of placer mining on the claims under review.

Franklin D. Arness
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN CONCURRING:

I am not seduced by the result in this case from my objections to the purported "balancing" of the values of mining and other uses of the land under 30 U.S.C. § 621(b) (1988) that was approved by the Board in U.S. Forest Service v. Milender, 104 IBLA 207, 95 I.D. 155 (1988), and applied to achieve this result. See 104 IBLA at 245-54, 95 I.D. at 176-80.

In my view, because the evidence demonstrates that placer mining of the claims would substantially interfere with other uses of the lands within them and that the interference cannot be remedied by restoration of the lands, placer mining must be prohibited on these claims. Id., 104 IBLA at 252, 95 I.D. at 180.

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Will A. Irwin
Administrative Judge